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FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 349

E. A. KELLEAM, NELL SOUTHARD, JOE E. KELLEAM AND JOE R. SOUTHARD, JR. ..... Petitioners,

vs.

MARYLAND CASUALTY COMPANY OF BALTIMORE, BALTIMORE, MARYLAND, A CORPORATION, MRS. ETHEL RIDDLER, MRS. DOROTHY PAYNE, ETC. ..... Respondents

BRIEF OF RESPONDENTS

W. V. PRYOR,
Counsel for the Respondents.
HEBER FINCH, Sapulpa, Oklahoma.
E. A. YOUNG, JR., Fort Smith, Ark.
PLINY FREE, Wewoka, Oklahoma.
HEBER FINCH, JR., Sapulpa, Oklahoma.
Of Counsel.

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BRIEF OF RESPONDENTS

Mrs. Ethel Riddler, Mrs. Dorothy Payne, J. K. Perkins, Mrs. F. Bates, Glen Perkins, Bessie Mathews, Mrs. Elouise Kulp, Leggette Hall, Lamar Hall, Marguerite Bradley Kelleam, Mary Kate Hall, Kelleam Hall, Clifford Kelleam, Kathleen Kelleam, Dr. Fannin Kelleam, Francis Kelleam, Mrs. Jimmie Kelleam and Robert Kelleam.

This brief is filed in behalf of the above named respondents, who were defendants, and cross-petitioners in the trial court. And for convenience they will be referred to as cross-petitioners in this brief.

This brief will be confined to the questions of law which govern the right of the cross-petitioners to the relief sought and granted, on their cross-petition, and affirmed by the Circuit Court of Appeals.

STATEMENT OF CASE

The cross-petitioners adopt the statement of facts contained in the brief of the Respondent, Maryland Casualty Company, and the facts as set forth by the Circuit Court of Appeals in the opinion rendered herein. (Tr. 136).

1. UNITED STATES DISTRICT COURT HAD AUTHORITY TO VACATE THE DECREE OF THE COUNTY COURT BECAUSE THE SAME WAS OBTAINED BY FRAUD.

The petitioners contend that the jurisdiction of the County Court of the State of Oklahoma in probate matters is an exclusive and original jurisdiction, the cross-petitioners find no fault with this statement of the law. The relief sought by the cross-petitioners in this case was from a decree fraudulently obtained in the state court and which showed on its face that it was both fraudulent and void. More than 30 days had elapsed before this decree was known of by the cross-petitioners or attacked in any court by them, and no appeal could be taken from such an order after that period—O. S., 1931, Section 1400-58 O. S. A. 724 reads as follows:

> "An appeal by a party, or by a person interested who was present at the hearing, must be taken within ten days, and an appeal by a person interested, who was not a party and not present at the hearing, within thirty days from the date of the judgment, decree or order appealed from."

The petitioners, herein, had already received the entire estate. There was no attempt by the cross-petitioners to have the Federal Court to take control of any property in the hands of the County Court or to interfere with its jurisdiction in the probate matter. A petition was filed to reopen the case in the County Court and the same judge rendering the fraudulent decree, sustained a demurrer to the petitioners petition to reopen the case and denied its jurisdiction to grant the relief sought, (Tr. 92). An appeal was taken to the District Court of Creek

County from this order. This appeal is now pending in the District Court and while the action of the District Court is not a part of the record in this case in view of the statements made by the petitioners in their brief, the cross-petitioners state that an order was made staying all proceedings in the State Court in that case, a certified copy will be furnished this Court, if desired, at the time of argument.

It is the accepted rule in both the State and Federal Court that a decree of a county court obtained by fraud, as shown in this case, may be attacked collaterally in either State or Federal Court.

Wheeler v Bigheart, 172 Okla., 262, 43 (P 2) 1028.

Caulk v Lowe, 74 Okla. 191, 178 Pac. 101;

Forgey v Lamphear, 144 Okla. 245, 289 Pac. 294.

Beatty v Beatty, 114 Okla. 5, 242 Pac. 766;

Hewitt v Hewitt, (9 Cir.) 17 Fed. (2nd) 716;

Marshall v Holmes, 141 U. S. 589 12 S. Ct. 62, 35 L. Ed 870.

Section 58, O. S. A. 128, reads as follows:

"The name of the applicant for letters, and the day on which the application will be heard; said notice must be given by posting the same in three public places in the county, one of which shall be at the courthouse in which said hearing is to be held; and a copy of same shall be mailed to each of the heirs of the deceased with the postage thereon prepaid. If the postoffice address of any of the heirs is unknown, notice of said hearing shall be given by publishing the same in some newspaper published in said county at least ten days before the day set for said hearing."

The original petition for letters of administration affirmatively shows that E. A. Kelleam and Nell Southard claimed to be the only heirs of the deceased Leggette D. Kelleam, (Tr. 21.) And the above statute was not complied with, no complaint is made by the cross-peti-

tioners of the appointment of E. A. Kelleam as administrator, although he was a non-resident of the State of Oklahoma, and did not so state in his petition for letters testamentary, nor did he comply with section 1017, O. S. 1931, relative to the appointment of a non-resident service agent. The entire record affirmatively discloses that the administrator did not at any time comply with the Oklahoma statutes relative to giving the other heirs notice of the pendency of the probate case in Creek County, Oklahoma, but in truth and in fact attempted to prevent them from finding it out and, when two of the heirs came in to claim their distributive share of the estate, the petitioners, E. A. Kelleam and Nell Southard, entered into a written agreement with them to the effect that they should receive $4,000.00 if the so-called determination heirship and decree of distribution was allowed to become final, (Tr. 29). The statutes and cases above cited could lead to but one conclusion: Fraud as found by the trial court.

The only difference in the cases cited, supra, and this case is that the relief sought and granted to the defrauded parties was by an original petition and in this case it was upon a cross-petition.

A CROSS-PETITIONER OR AN INTERVENOR MAY OBTAIN THE SAME RELIEF AS THEY COULD IF THEY WERE ORIGINAL PETITIONERS

Republic National Bank and Trust Company v Massachusetts Bonding Company, (5 Cir.), 68 F. (2d) 445.

Central Surety Corporation et al v Bagley, (9 Cir.) 44 Fed. (2d) 808.

The case of *Republic National Bank and Trust Company v. Massachusetts Bonding and Insurance Company,* supra, settles the point definitely that the Maryland Casualty Company had the right to file this bill under its own peculiar rights as surety to seek protection of the Federal District Court and the case further gives the right to the cross-petitioners, who were made defendants by

the Plaintiff, Maryland Casualty Company, to have their rights adjudicated in and to any funds or property over which the court acquired jurisdiction by reason of the original action.

The petitioners in their brief suggest to the court that the District Court should have realigned the parties according to their actual sides in the dispute. In the case of *Republic National Bank and Trust Company v Massachusetts Bonding and Insurance Company,* supra, this same contention was made. In this case, the contractor gave a bond to the Republic National Bank and Trust Company to finance him on a certain job with loans made against an assignment of all monies due and to become due on the job. The final payment of $29,000.00 was authorized by the city and the bank representative went with the contractor to arrange collection of it. Three claimants for material and machinery notified the city of their claim and asserted liens amounting to over $5,000.00. The bank and the contractor got from the city a check in the sum of $23,000.00, which the contractor endorsed and the bank applied to a note of that amount held against the contractor. There were numerous other claims and the contractor not having money to pay these claims, placed his affairs in receivership in the state court. The bonding company filed a bill setting up these facts making the parties defendant, the contractor, the city, the bank, who were citizens of Texas and numerous claimants, many of them citizens of Texas, and all of the citizenship other than that of Massachusetts. The contention was made in that case that many of these citizens of Texas are interested with the sureties as against the city and the bank ought to be aligned accordingly, especially since by their answer they had joined in the prayer for the restoration from the bank the $23,000.00. If thus aligned, there would be citizens of Texas on both sides of the controversy. The court in its opinion stated:

> "The basis of the surety's case is an equity of exoneration, an assertion that there are funds of its principal properly applicable to the claims against the bond that ought in equity to be so applied before

he is called on to pay. We examined and upheld this right of the surety on a construction bond under circumstances much like the present in Glades County v. Detroit Fidelity & Surety Company, 57 Federal (2d) 449. The bill is thus based on the surety's own peculiar rights and seeks its protection as surety. If some of the defendants favor the relief prayed, it occasions no realignment of parties to the destruction of the surety's right to federal jurisdiction. By the main bill it acquired jurisdiction over the retained payment and the surety's liability on the bond as a fund for distribution and could deal fully with those subjects."

Attack was also made on the jurisdiction to entertain the so-called cross bills against the city and the bank filed by claimants who were citizens of Texas, wherein they sought money judgments against the city and the bank for the amount of their claims. These judgments a federal court could not grant. By the main bill it acquired jurisdiction over the retained payment and the surety's liability on the bond as a fund for distribution, and could deal fully with those subjects. A dependent jurisdiction arose to settle disputes even between citizens of the same state and involving amounts less than $3,000.00, so far as necessary fully to administer that fund. But dependent jurisdiction exists only because and so far as it is necessary to fully exercise the main jurisdiction.

In this case the defendants and cross-petitioners have not sought to have any personal judgment against the petitioners, but only relief which they prayed for was for the court to distribute the funds, or property, which the Maryland Casualty Company asked the District Court to take charge of in order to protect them on their bond.

The case of *Central Surety Company v Bagley*, supra, holds in addition to granting relief to cross-petitioners similiarly situated to the cross-petitioners herein, held that the Federal Court having once acquired jurisdiction

could adjudicate all matters and claims even though there was pending litigation in the state courts about the same subject matter. We quote syllabus 4 of that case:

> "Federal Court, in surety's suit to marshall assets, having taken possession of the res, may determine controversies regarding disputed claims and liens pertaining to the property seized, notwithstanding pendency of suits in state court." (Jud. Code 265 28 USCA 379.)

2. THE JUDGMENT OF THE COUNTY COURT DECLARING THE ESTATE OF LEGGETTE D. KELLEAM TO BE ANCESTRAL IS VOID.

Under the Oklahoma Law kindred of half blood inherit equally with those of whole blood and in the same degree, unless the property is ancestral, this rule is set out in Section 1626 of the Oklahoma Statutes of 1931, which reads as follows:

> "Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance come to the intestate by descent, devise, or gift or some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from the inheritance."

The record of this case discloses upon examination that none of the property constituting in the estate of Leggette D. Kelleam was in fact ancestral, it consisting of both real and personal property. The inventory (Tr. 25) discloses that the estate consisted of two houses and lots purchased from the Tulsa Building and Loan Association by the deceased and dated August 8, 1933 (Tr. 112), that the Sam Vance lease was acquired in 1930 (Tr. 107), that one Drumright property was acquired on October 29, 1932, and the other October 21, 1935. The record disclosed that Mary A. Kelleam, the mother of Leggette D. Kelleam, died December 4, 1928, her property consisting of 6 lots in Blanchard, Oklahoma, she being the ancestor through whom the estate was alleged to be ancestral, and being dead many years prior to the ac-

quisition of any of the real estate of the deceased Leggette D. Kelleam. There can be no ancestral estate in real property acquired after the death of an ancestor.

In re *Long's Estate,* 180 Okla. 28, 67 P. (2d) 41, 110 A. L. R. 1002.

Zweigel v Lewis, 139 Okla. 171, 281 Pac. 787;

Thompson v Smith, 102 Okla. 150, 227 Pac. 77, 29 L. R. A. 541;

In re *Yahala's Estate,* 142 Okla. 79, 285 Pac. 946;

80 O. S. A. 222;

18 C. J. 819, sec. 21;

Eason v Highley, 28 S. W. (2d) 1048;

Kelly v McGuire, 15 Ark. 555;

There can be no ancestral estate in personal property.

80 O. S. A. 222;

18 C. J. 819, Sec. 21;

Eason v Highley, 28 S. W. (2d) 1048;

Kelly v McGuire, 15 Ark. 555;

Henderson v Sherman, 47 Mich. 267, 11 N. W. 153;

Adams v Anderson, 53 N. Y. S. 141.

The reason for this rule is set out in the case of Matter of New York Security, etc. Company, 94 N. Y. S. 93, herein the court said:

> "It is the policy of the law to avoid such a construction of a statute as will lead to promote litigation. Were it held that the source from which personal property came controlled in any way its distribution, untold litigation and uncertainty would result by reason of the difficulty in tracing and identifying personal property."

The decree of distribution and determination of heir-

ship by the County Judge of Creek County was in plain contravention of the Statutes of the State of Oklahoma and therefore, void.

In re *Sims' Estate,* 162 Okla. 35., 18 P (2d) 1077;

In re *Green's Estate,* 80 Okla. 256, 196 Pac. 128.

In the case of In re Sims' Estate, supra, the court held that where one died the estate and his widow elected to take under the law rather than the will, a decree of distribution in contravention of the statute of the State of Oklahoma awarding here a greater amount than she would take under the statute is absolutely void. And it is the contention of the cross-petitioners that the decree of distribution and determination of heirship in this case being in plain contravention of the statute, comes clearly within the doctrine announced in this case.

CONCLUSION

The petitioners herein do not claim that the cross-petitioners were not the legal heirs of Leggette D. Kelleam, deceased, and entitled to their distributive shares in his estate and it is not contended in their brief that the estate was in fact ancestral. The petitioners E. A. Kelleam and Nell Southard admit they obtained the entire estate of Leggette D. Kelleam both their own shares, and those of the cross-petitioners, herein, the attitude assumed by these petitioners now is having obtained the property in the decree of distribution this court should and has not the legal right to require them to make restitution. The trial court found this decree to be both void and fraudulent, the circuit court in affirming the opinion said:

"The only conclusion which can be reached from an examination of the transcript is that E. A. Kelleam was a faithless trustee, that he designedly and intentionally proceeded from the beginning to conceal the status of the estate from the court and the heirs; and that he and his sister conspired together

to defraud the remaining heirs of that which
their just due. The conclusion of the trial cour
the only one that can be reached."

We respectfully submit that the decisions of the t
court and the Circuit Court of Appeals should be
firmed.

W. V. PRYOR,

Counsel for the Respond

HEBER FINCH, Sapulpa, Oklahoma.

R. A. YOUNG, JR., Fort Smith, Ark.

PLINY FRYE, Wewoka, Oklahoma.

HEBER FINCH, JR., Sapulpa, Oklaho

Of Counsel

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SUPREME COURT OF THE UNITED STATES.

No. 349.—October Term, 1940.

E. A. Kelleam, Nell Southard, Joe E. Kelleam and Joe R. Southard, Jr., Petitioners, vs. Maryland Casualty Company of Baltimore, Md., et al. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[February 17, 1941.]

Mr. Justice Douglas delivered the opinion of the Court.

This controversy has its origin in a probate proceeding in an Oklahoma court. Petitioner, E. A. Kelleam, was administrator in that proceeding. Respondent, Maryland Casualty Company, was surety on his bond. The probate court held that all of decedent's property was a maternal ancestral estate to which the full-blood heirs, E. A. Kelleam and Nell Southard, were entitled to the exclusion of the half-blood heirs, the individual respondents here. Such distribution was ordered and the administrator and Maryland Casualty Company were discharged from further liability. No appeal was taken; but shortly thereafter the half-blood heirs brought an action in the Oklahoma court to set aside that decree, alleging that petitioners E. A. Kelleam and Nell Southard had perpetrated a fraud upon the probate court and that the half-bloods were entitled to participation, the estate being a general not an ancestral estate. A demurrer to the complaint was sustained and an appeal was taken to the Oklahoma District Court where it is now pending. After that suit had been commenced[1] respondent-surety, learning that E. A. Kelleam and Nell Southard had transferred some of the property received from the estate,[2] brought this suit in the United States District Court, joining the full-bloods and the half-bloods as defendants and invoking federal jurisdiction on the basis of diversity of citizenship. In this suit in equity[3] respondent-surety

[1] Respondent-surety apparently was served with notice of that suit and appeared therein for the purpose of quashing the notice.

[2] According to the findings below, transfers were made to petitioners Joe E. Kelleam and Joe R. Southard, Jr.

[3] This was not a bill of interpleader under 49 Stat. 1096, 28 U. S. C. §41(26) nor a suit under the Federal Declaratory Judgment Act, 48 Stat. 955, 49 Stat. 1027; 28 U. S. C. § 400.

sought exoneration on its bond, alleged that its remedy at law was inadequate, and prayed that a receiver be appointed to preserve the decedent's property pending the outcome of the dispute between the heirs, and that the parties be required to set up whatever claims they might have to the property. By their answer and cross-petition, the half-bloods renewed their claims of fraud in the probate decree and joined in the prayer for the appointment of a receiver. The answers of petitioners alleged, *inter alia*, lack of jurisdiction in the federal court by reason of the action in the state court; and they moved to strike the cross-petition for lack of jurisdiction. By an amendment to its bill respondent-surety added allegations charging fraud in the probate decree. The District Court found that petitioners E. A. Kelleam and Nell Southard, knowing of the existence of the other heirs, fraudulently concealed those facts from the probate court, gave no notice to the other heirs as required by law, and represented that E. A. Kelleam was a resident of Oklahoma when he was not; that the administrator failed to appoint a service agent as required by Oklahoma statutes; that the estate was fraudulently represented as an ancestral estate and that petitioners E. A. Kelleam and Nell Southard in furtherance of the plan to defraud the half-bloods consummated a settlement with some of them in exchange for their agreement not to contest the probate decree; that that decree, having been obtained by fraud, was void as to the half-bloods; that the intermediate conveyances by petitioners E. A. Kelleam and Nell Southard were fraudulent; that the remaining assets of the estate were in danger of being dissipated; that respondent-surety would become liable to the half-bloods for failure of the administrator to perform his duties; and that the property should be preserved pending a final order of accounting. Accordingly, it appointed a receiver, decreed that respondent-surety was entitled to exoneration by having designated property applied to the satisfaction of the interests of the half-bloods, decreed that the half-bloods were owners of designated undivided interests in the estate, established a lien thereon, and ordered petitioners E. A. Kelleam and Nell Southard to account. The Circuit Court of Appeals affirmed. 112 F. (2d) 940. We granted certiorari because of the challenged propriety of the action of the District Court in appointing a receiver and in adjudicating matters at issue in the state court.

We think the bill should have been dismissed.

The essential purpose of the bill was to secure the appointment of a receiver so as to conserve the property and to impress it with a lien for the surety's protection. The surety had no stake in the outcome of the dispute among the heirs beyond its contingent right to exoneration. In this posture of the case it is manifest that respondent-surety sought the receivership not as a means to an end but as an end in itself. The receivership was ancillary only in the sense that it was protective of the surety whatever the future outcome of the controversy between the heirs. The surety was not presently liable on its bond; its liability and its right to exoneration were wholly contingent, being dependent on a successful attack on the probate decree by the half-bloods. That attack was currently being made in the state court.

Accordingly, a receiver should not have been appointed. The error in the appointment was not a question of authority but of propriety. *Pennsylvania* v. *Williams,* 294 U. S. 176; *Gordon* v. *Washington,* 295 U. S. 30. As this Court stated in the *Gordon* case (p. 37): "A receivership is only a means to reach some legitimate end sought through the exercise of the power of a court of equity. It is not an end in itself." Receiverships for conservation of property "are to be watched with jealous eyes lest their function be perverted." *Michigan* v. *Michigan Trust Co.,* 286 U. S. 334, 345. This Court has frequently admonished that a federal court of equity should not appoint a receiver where the appointment is not a remedy auxiliary to some primary relief which is sought and which equity may appropriately grant. *Booth* v. *Clark,* 17 How. 322, 331; *Pusey & Jones Co.* v. *Hanssen,* 261 U. S. 491; *Gordon* v. *Washington, supra.* And the reasons for such restraint are reinforced where the rights to the property sought to be conserved by a receivership are being litigated in a state court. Cf. *Penn General Casualty Co.* v. *Pennsylvania,* 294 U. S. 189; *Pennsylvania* v. *Williams, supra.* There was here no accrued right of the surety as respects the enforcement of which the receivership was an ancillary remedy, its right to exoneration being wholly contingent.[4] The existence of any right to exoneration was dependent on the outcome of the action which was pending in the Oklahoma court.

[4] Cf. Glades Co., Fla. *v.* Detroit Fidelity & Surety Co., 57 F. (2d) 449, 453; Morley Const. Co. *v.* Maryland Casualty Co., 90 F. (2d) 976; Southwestern Surety Ins. Co. *v.* Wells, 217 Fed. 294; Central Surety & Ins. Corp. *v.* Bagley, 44 F. (2d) 808; Arant, Suretyship (1931) pp. 318-321.

In view of those circumstances, equity practice does not sanction the use of a conservation receivership to protect such a claim. Furthermore, from all that appears, the surety could be adequately protected in the cause pending in the Oklahoma court by provisional remedies or otherwise.

Respondent-surety contends that under Oklahoma statutes a surety may obtain indemnity against his principal even before the debt is due and receive the protection of various provisional remedies. Even so, a "remedial right to proceed in a federal court sitting in equity cannot be enlarged by a state statute." *Pusey & Jones Co.* v. *Hanssen, supra,* p. 497.

For these reasons, the appointment of the receiver was an abuse of discretion.

Since respondent-surety had no present claim to relief on its own behalf in the federal court, that court had no jurisdiction to adjudicate the dispute between the full-bloods and the half-bloods. Even if, on this record, the presence of respondent-surety would support a claim to diversity of citizenship, that diversity was lacking as between the other parties. Hence once the bill of complaint were dismissed, no jurisdiction would remain for any grant of relief under the cross-petition. See *Kromer* v. *Everett Imp. Co.,* 110 Fed. 22. And even if the bill be construed as drawing in issue the merits of the controversy between the heirs which the federal court had jurisdiction to adjudicate within the rule of *Arrowsmith* v. *Gleason,* 129 U. S. 86, and *Sutton* v. *English,* 246 U. S. 199, 205, that court could not with propriety proceed. A case involving that very controversy was pending in the Oklahoma court. That case did not involve simply an *in personam* action. Cf. *Kline* v. *Burke Construction Co.,* 260 U. S. 226. It involved an adjudication of rights to specific property distributed pursuant to a probate decree. Cf. *Penn General Casualty Co.* v. *Pennsylvania, supra,* at p. 195. The federal court therefore should not have asserted its authority. In such a case it is "in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Pennsylvania* v. *Williams, supra,* p. 185.

Reversed.